IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-750

SEARS, ROEBUCK AND CO.,
Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

BRIEF AMICUS CURIAE ON BEHALF OF AMERICAN RETAIL FEDERATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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The American Retail Federation hereby files a brief *amicus curiae* in support of the Petition of Sears, Roebuck and Company for Writ of Certiorari to the Supreme Court of California.[1]

1. Request for consent to file a brief *amicus curiae* has been made to the parties pursuant to Rule 42 of the Rules of this Court. Both parties have given their consent, and written consent will be filed with the Clerk of the Court.

I.

INTEREST OF THE AMICUS CURIAE.

The American Retail Federation is an organization consisting of national and state associations of retailers. The various associations consist of retailers of all types and sizes from small locally-owned stores to major national chains. Thus, the Federation represents the interests of all facets of the retail community. The retail community consists of approximately 1.5 million retailers employing nearly 14 million employees in an industry with a substantial relationship with interstate and international commerce. The industry accounts for over 35 percent of the Gross National Product.

The issue in this case, the jurisdiction of state courts to apply the basic general law of trespass to instances of unauthorized entry upon property by non-employee union agents, is a matter of significant concern to the Federation and its affiliates in the various states, and the individual retailer-members of those affiliates. The absence of definitive guidance from the Court has led to conflicting results from various state courts, leaving retailers, many of whom are the owners of the property on which their stores are located, uncertain as to their rights and remedies when faced with trespass upon their premises. This issue is of particular interest to retailers not only because of the large numbers of persons they employ, but also the large number of companies, *i.e.* supplies, advertising media, *etc.* with whom they do business. As a result, trespass may occur in the context of labor disputes and consumer boycotts involving labor organizations with whom the retailer has no relationship whatsoever. The Federation is vitally concerned that the proper balance be struck between the interest of the various states in insuring domestic peace through the exercise of jurisdiction in cases of trespass and the interest of the federal government in enforcing a uniform labor policy.

The Federation has filed briefs as *amicus curiae* in other cases of similar concern to its members and the retail community, *Central Hardware Company* v. *NLRB*, 407 U. S. 539 (1972), *Taggart* v. *Weinacker's*, 397 U. S. 223 (1970), *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), and is familiar with the problems presented as they affect large and small businesses. A Federation affiliate, the Illinois Retail Merchants' Association, filed a brief *amicus curiae* before the Illinois Supreme Court in a case similar to this in which there was a contrary result. *May Department Stores Company* v. *Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N. E. 2d 7, 93 LRRM 2592 (1976). The Federation believes that its views may be of assistance to the Court in resolving the issues raised.

II.

SUMMARY OF ARGUMENT.

This case presents a question of vital interest to business people, labor organizations, courts, law enforcement agencies and individuals throughout the nation. It is a question that has not yet been decided by this Court and the absence of clear guidance on this issue has resulted in substantial conflict among decisions of various States in an area where the rights of the parties and authority of the States should be made clear. The court below has misapplied the preemption standards set forth by this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 43 LRRM 2838 (1959), and misconstrued the exceptions contained therein for permissible exercise of state authority. It has failed to recognize the relationship between *Garmon* and those cases decided by this Court which consider the relationship between private property rights and federal control of labor relations. *NLRB* v. *Babcock and Wilcox*, 351 U. S. 105, 38 LRRM 2001 (1956); *Hudgens* v. *NLRB*, 424 U. S. 507, 96 S. Ct. 1029, 91 LRRM 2489 (1976).

III.

ARGUMENT FOR GRANT OF WRIT.

A. This Case Presents an Important Question of Federal Law Which Has Not Been But Which Should Be Decided by This Court and Which Is for Lack of Guidance the Subject of Conflict in Decision Among the States.

The Petition for Writ of Certiorari addresses this strong reason for the Court's review of the decision below. The Federation agrees with, supports and adopts that portion of the Petition.

The variation of state application of the *Garmon* doctrine underlines the need for re-examination of the *Garmon* guidelines and the establishment of clearer standards on those issues where the impact of varying results is most vexatious.[2]

The Court perhaps recognized that need in granting a Writ of Certiorari in *Hill* v. *United Brotherhood of Carpenters, Local 25, cert. granted* Case 75-804, 44 U. S. L. W. 3427 (1976), in which the Court is presently reviewing the authority of a state court to entertain a common law cause of action arising out of a labor organization's activity that may also subject it to unfair labor practice charges before the National Labor Relations Board. However, the question there presented is distinguishable from this case in that it relates to the existence of common law jurisdiction and to the rights of individual union members vis-a-vis their labor organization, and will not resolve the issue here presented.

Rather, the Court in this case is asked to review the relationship between federal labor policy and the maintenance of domes-

2. The confusion that exists was recently illustrated in *Wiggins & Co.* v. *Retail Clerks Union*, Tenn. Chancery Court, Knox County, No. 57199, 93 LRRM 2782 (Sept. 9, 1976). The court there concluded that this Court's decision in *Hudgens* v. *NLRB*, 424 U. S. 507, 91 LRRM 2489 (1976), deprived state courts of jurisdiction to consider allegations of trespass on private property. Cf. *People* v. *Bush*, 39 N. Y. 2d 529, 92 LRRM 3268 (1976), wherein the court, in a similar trespass case, read *Hudgens* in a conflicting manner.

tic peace by the States through their exercise of jurisdiction in trespass matters and enforcement of their general criminal and civil trespass laws.

B. The Court Below Has Misconstrued This Court's Garmon Rule and Applied It Without Regard to Other Decisions of This Court Involving Private Property Rights and Labor Union Activity.

(1) The Court Below Has Improperly Applied the Garmon Preemption Standards.

This Court, in *San Diego Building Trades Council* v. *Garmon, supra* established its preemption test and the exceptions thereto. State jurisdiction, said the Court, is preempted where the activities which a state purports to regulate are clearly or may fairly be assumed to be protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*

In *NLRB* v. *Babcock and Wilcox*, 351 U. S. 105, 38 LRRM 2001 (1956), the background against which *Garmon* was decided, this Court affirmed the primacy of private property rights in the scheme of federal labor relations. This Court held that an owner had no obligation, *ab initio*, to open his real property to non-employee union representatives in organizational situations. The labor organization, it held, has the burden of first asserting and then proving the absence of a suitable alternative to access to private property. This has most recently been reaffirmed in *Hudgens* v. *NLRB*, 424 U. S. 507, 96 S. Ct. 1029, 91 LRRM 2489 (1976).

The court below has thus failed to perceive the relationship between this Court's decisions in *Garmon* and that in *Babcock and Wilcox* which characterized such trespass as presumptively prohibited.[3]

3. We raise the issue of the relationship between *Garmon* and *Babcock and Wilcox* because the court below relied, in part, on a

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(2) This Question Falls Squarely Within the Garmon Exceptions.

In *Garmon,* this Court carved out two exceptions to the general rule where (1) the activity regulated is merely a peripheral concern of the Act or (2) where the regulated conduct touches interests deeply rooted in local feeling and responsibility. In these instances, in the absence of compelling federal direction it should not be inferred that the Congress deprived the States of the power to act.

The National Labor Relations Act was not passed by Congress without reference to the

> ". . . larger context of state law creating rights of property, bodily security, and personality, preserving public order and promoting public health and welfare. These laws apply to the general public or substantial segments thereof without regard to whether the individual is an employer, union or employee concerned with unionization or a labor dispute. Neither the laws themselves nor any particular application involves weighing the special interests of employers, unions, employees or the public in employee self-organization, collective bargaining or labor disputes. The likelihood that the collateral impact of such laws upon management of labor will upset the national balance is small enough to permit their operation unless interference with a specific federal right can be affirmatively demonstrated." Cox, *Labor Law Preemption Revisited,* 85 Harv. L.R. 1337 at 1355-1356 (1972).

The court below improperly concluded that Congress intended to leave the enforcement of private property rights to individual self-help. Such a conclusion encourages the attendant danger of

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finding that the Union therein had organizational motives. The Illinois Supreme Court drew a connection between these cases in its decision in *May Department Stores* v. *Teamster's Local 743,* 64 Ill. 2d 153, 355 N. E. 2d 7, 93 LRRM 2592 (1976), discussed *infra.* Amicus does not understand that this Court has extended the *Babcock and Wilcox* accommodation principle to any situation other than one organizational in nature.

breach of the public peace, while leaving to the trespasser the decision whether to attempt to bear the heavy burden of establishing its need to encroach to the satisfaction of the National Labor Relations Board. Such a result was neither intended by Congress nor supported by this Court in *Garmon* and *Babcock and Wilcox.* It is beyond dispute that it is of great local concern that property owners resort to legal process rather than self-help to enforce property rights, subject to the imposition of remedial action by the National Labor Relations Board in those exceptional cases where it finds that the trespass must be permitted. The court below has thus failed to recognize that the enforcement of local trespass law falls within the *Garmon* exception permitting state regulation of conduct touching interests deeply rooted in local feeling and responsibility. Threats of violence are no less critical to local concern when such violence may be perpetrated by a land owner in protection of his rights than when perpetrated by a labor organization in pursuit of its rights. *Youngdahl* v. *Rainfair,* 355 U. S. 131, 41 LRRM 2169 (1955); *United Automobile Workers* v. *Russell,* 356 U. S. 634, 42 LRRM 2142 (1958); *United Construction Workers* v. *Laburnum,* 347 U. S. 656, 34 LRRM 2229 (1954). This is one factor which persuaded the Illinois Supreme Court to uphold the jurisdiction of Illinois courts to enjoin trespass by non-employee union agents.

In *People* v. *Goduto,* 21 Ill. 2d 605, 174 N. E. 2d 385 (1961), *cert. denied,* 369 U. S. 927, 82 S. Ct. 361 (1961), the Illinois Supreme Court upheld the conviction of union agents for violation of the state criminal trespass statute. In doing so, the Court held that the basic purpose of the statute was the prevention of violence or threats of violence which arise whenever a person refuses to leave the property of another after he has been ordered to do so. That in fact no violence occurred was found immaterial as being attributable simply to the fact that the property owner refrained from resorting to self-help to remove the trespassers.

In *May Department Stores Company* v. *Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N. E. 2d 7, 93 LRRM 2592, the Illinois Supreme Court relied on its *Goduto* decision in upholding the injunction issued by the Circuit Court of Cook County.

> "The foundation of our opinion in *Goduto* was that an imminent threat of violence exists whenever an employer is required to resort to self-help in order to vindicate his property rights. Such a situation would result from our acceptance of the union's contention that State courts have no authority to act against a trespass by nonemployee union organizers. Since trespass by a union organizer is not an unfair labor practice, the NLRB is unable to grant any relief to a deserving employer. If the employer is also denied access to the State courts, his only recourse is to employ self-help. See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1362-63 (1972).
>
> "This imminent threat of violence which is inherent in any situation in which an aggrieved party is denied access to a court of law has been recognized by the United States Supreme Court. In *Linn* v. *United Plant Guard Workers, Local 114* (1966), 383 U.S. 53, 15 L.Ed. 2d 582, 86 S.Ct. 657, the court allowed State court jurisdiction over an action for malicious libel which has resulted from a union organizational campaign. The *Linn* court noted:
>
> > 'The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized.' 383 U.S. 53, 64 n.6, 15 L.Ed. 2d 582, 590 n.6, 86 S.Ct. 657, 664 n.6.
>
> "We consider the foregoing statement fully applicable to the historic and deeply rooted interest of the State in maintaining domestic peace through application of its trespass law remedies. We adhere to the holding of *Goduto* that under the *Garmon* doctrine the States are not pre-

> empted from jurisdiction of a trespass action involving nonemployee union organizers." Slip opinion at p. 5.

Thus, the Illinois Supreme Court's decision is in direct conflict with that of the court below, the latter holding that an injunction against trespass may not stand because the injunction was aimed at protecting not the public welfare but the private rights of the property owner. The court below failed to perceive the threat of violence created by the failure to enforce restrictions on trespass as a matter of local concern within the *Garmon* exception.

The California court has also failed to recognize that exercise of state jurisdiction in trespass matters is within the *Garmon* exception where the matter is of only peripheral importance to the administration of federal labor policy. Here again, the California Supreme Court is in direct conflict with the Supreme Court of Illinois which found in its *May* decision that:

> "The temporary injunction entered by the circuit court did not present a potential conflict with Federal Labor policy, nor did it adversely affect any rights granted the union by the NLRA. The injunction was narrowly aimed at organizational activity on company property and specifically noted that it was not to apply to solicitation on the public sidewalks adjacent to the Venture parking lot. The temporary injunction merely had the effect of maintaining the status quo during the pendency of the NLRB proceedings. No prejudice to the union could result from this pattern since the injunction could have been vacated immediately upon an NLRB finding in favor of the union. In the highly unlikely event that the circuit court would refuse to vacate the injunction in these circumstances, the NLRB could provide relief by seeking to enjoin the order of the State court. *NLRB* v. *Nash-Finch Co.* (1971), 404 U.S. 138, 30 L.Ed. 2d 328, 92 S.Ct. 373." Slip opinion at p.6.

This exercise of state court jurisdiction is merely peripheral to the administration of the Act. The state courts do not seek to make those determinations reserved to the Labor Board, but

only to maintain the *status quo* peacefully while the Labor Board acts.[4]

Clearly, to permit the exercise of such State jurisdiction is consistent with and in support of a uniform federal labor policy. It peacefully encourages resort to NLRB procedures for the uniform application of statutory standards. The only means of access to the Board for a determination of whether private property rights must yield to those created by the National Labor Relations Act is for the employer to deny access to its property. The union must then file an unfair labor practice charge. Congress has provided no vehicle for a property owner to request such determination from the National Labor Relations Board. The labor organization will not file such a charge so long as it has the opportunity to encroach on private property without challenge. To provide for the property owner's resort to the state courts to seek the protection of State trespass laws, rather than leave him no remedy but resort to self-help, peacefully encourages the labor organization to place the question before the Board for determination.

4. The distinction between making the final decision and merely maintaining the status quo to permit the Labor Board to do so was clearly recognized by the New York Court of Appeals in *People* v. *Bush, supra* 39 N. Y. 3268, 92 LRRM 3268 (1976).

> ". . . Under the preemption doctrine of Garmon, it is not for us to say whether, had they [the trespassers] applied to the NLRB, they could have brought themselves within the limitations set out in Babcock and Hudgens. It is our province, however, to say that they should have ascertained these limits as they applied to the picketing in question here before remaining intransigently on private property."

IV.

CONCLUSION.

For the foregoing reasons, the Amicus respectfully requests that the Court grant the Petitioner's request for a Writ of Certiorari to the California Supreme Court.

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